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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/616,675	07/10/2003	Daniel Charles Birkestrand	ROC920030150US1	2590
46296	7590	08/24/2007	EXAMINER	
MARTIN & ASSOCIATES, LLC			ZHE, MENG YAO	
P.O. BOX 548			ART UNIT	PAPER NUMBER
CARTHAGE, MO 64836-0548			2195	
		MAIL DATE		DELIVERY MODE
		08/24/2007		PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>
	10/616,675	BIRKESTRAND ET AL.
	<b>Examiner</b>	<b>Art Unit</b>
	MengYao Zhe	2109

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) Responsive to communication(s) filed on 12 June 2007.
- 2a) This action is **FINAL**.                    2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) Claim(s) 1,2,4-8,10-14,17,19 and 22-24 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1,2,4-8,10-14,17,19 and 22-24 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on 12 June 2007 is/are: a) accepted or b) objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) All    b) Some \* c) None of:
1. Certified copies of the priority documents have been received.
  2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date 4/27/2007.
- 4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) Notice of Informal Patent Application
- 6) Other: \_\_\_\_\_.

## **DETAILED ACTION**

1. Claims 1, 2, 4-7, 8, 10-13, 14, 17, 19, and 22-24 are presented for examination.

### ***Claim Rejections - 35 USC § 101***

2. 35 U.S.C. 101 reads as follows:

Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.

3. Claims 1, 2, 4, 5, 8, 10, 11, 14, 17, 19, and 22 are rejected under 35 U.S.C. 101 because the claimed invention is directed to non-statutory subject matter. The current focus of the Patent Office in regard to statutory inventions under 35 U.S.C. § 101 for method claims and claims that recite a judicial exception (software) is that the claimed invention recite a practical application. Practical application can be provided by a physical transformation or a useful, concrete and tangible result. No physical transformation is recited and additionally, the final result of the claim is the sum of all minimum resource specification never exceeding a total of resources which is not a tangible result because, the status of minimum resource specification is forever in the state of not exceeding a set amount of value, making the produced result remains in the abstract and, thus, fails to achieve the required status of having real world value. The following link on the World Wide Web is for the United States Patent And Trademark Office (USPTO) policy on 35 U.S.C. §101.

[http://www.uspto.gov/web/offices/pac/dapp/ola/preognitice/guidelines101\\_20051026.pdf](http://www.uspto.gov/web/offices/pac/dapp/ola/preognitice/guidelines101_20051026.pdf)

***Double Patenting***

4. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the “right to exclude” granted by a patent and to prevent possible harassment by multiple assignees. A nonstatutory obviousness-type double patenting rejection is appropriate where the conflicting claims are not identical, but at least one examined application claim is not patentably distinct from the reference claim(s) because the examined application claim is either anticipated by, or would have been obvious over, the reference claim(s). See, e.g., *In re Berg*, 140 F.3d 1428, 46 USPQ2d 1226 (Fed. Cir. 1998); *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970); and *In re Thorington*, 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

5. A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) or 1.321(d) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent either is shown to be commonly owned with this application, or claims an invention made as a result of activities undertaken within the scope of a joint research agreement.

6. Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

7. Claims 1, 4, 8, 10, 14, and 19 are rejected on the ground of nonstatutory obviousness-type double patenting as being unpatentable over claim 1 of Patent Application No. 10/616,676 (hereafter 10/616,676) in view of McCarthy et al., Pub. No. 2004/0194089 (hereafter McCarthy). Although the conflicting claims are not identical, they are not patentably distinct from each other because both computer methods comprise substantially the same elements.

8. As per claim 1 of this application and claim 1 of 10/616,676, they both teach an apparatus comprising: processor; a memory, a plurality of logical partitions defined on the apparatus and a capacity manager residing in the memory and executed by the at least one processor.

The only difference between this application and 10/616,676 is that claim 1 of 10/616,676 teaches a meter used to measure the actual usage of resources for billing purposes.

However, it would have been obvious that in order to meter the actual use of the at least one resource so that one can bill for the actual usage, the amount of resources used has to be tracked using the meter.

Claim 1 of this application teaches that the capacity manager controlling access to a minimum resource specification for each of the plurality of logical partitions by not

allowing a sum of all the minimum resource specifications for all of the plurality of logical partitions to exceed a total of resources that are permanently enabled in the apparatus.

However, McCarthy teaches the capacity manager controlling access to a minimum resource specification by not allowing a sum of all the minimum resource specifications to exceed a total of resources that are permanently enabled in the apparatus (*[0016], lines 16-19*).

Therefore, it would have been obvious to one of an ordinary skill in the art at the time the invention was made to have combined the teaching of 10/616,676 and McCarthy, because both systems allows for control over resource usages in computers.

9. As per claims 4, 8, 10, 14, and 19, they are rejected for the same reasoning as above.

#### ***Claim Rejections - 35 USC § 112***

10. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

11. Claims 1, 2, 4-7, 8, 10-13, 14, 17, 19, and 22-24 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

A The following claim languages are unclear and indefinite:

i) Claim 1, line 9, it is uncertain as to what "the minimum resource specifications" are <i.e. how is the specification established? Who specifies this? How is it different from just the amount of resources that are originally activated on each of the partitions?>

Claims 2, 4-7, 8, 10-13, 14, 17, 19, and 22-24 exhibit the same deficiencies.

#### ***Claim Rejections - 35 USC § 103***

12. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

13. Claims 1, 2, 4, 6, 12, 14, 17, 19, and 23 are rejected under 35 U.S.C. 103(a) as being unpatentable over McCarthy et al., Pub. No. 2004/0194089 (hereafter McCarthy) in view of Camble et al., Publication No. US2003/0135580 (hereafter Camble).

14. Camble et al. was cited in the last office action.

15. As per claims 1, 4, 14, and 19, McCarthy teaches an apparatus comprising:  
At least one processor (Fig 1, unit 30);

A memory coupled to the at least one processor (Fig 1, units 30, 40, and 42);

A plurality of applications defined on the apparatus (Fig 1, units 20-23)

A manager residing in the memory (Right column 6, lines 6-7 of claim 18)

A capacity manager (Right column 6, claim 18, lines 6-7)

A minimum resource enforcement mechanism that controls access to a minimum resource specification by not allowing a sum of all the minimum resource specifications to exceed a total of resources that are permanently enabled in the apparatus ([0016] lines 16-19).

16. McCarthy does not specifically teach a plurality of logical partitions defined on the apparatus.

However, Camble teaches a plurality of logical partitions defined on the apparatus ([0018], lines 22-29) and a capacity manager that specifically manages at least one temporary resource on demand for a specific resource-time for at least one of the plurality of logical partitions for the purpose of tracking resource usages ([0026], lines 1-9).

17. It would have been obvious to one having ordinary skill in the art at the time of the applicant's invention to modify the invention of McCarthy with a plurality of logical partitions defined on the apparatus and a capacity manager that specifically manages at least one temporary resource on demand for a specific resource-time for at least one of the plurality of logical partitions, because it allows the system to track resource usages and limits the amount of resource usage as to not exceed the available resources.

18. As per claims 2 and 17, Camble teaches a capacity manager that resides in a partition manager that manages the plurality of logical partitions. (*unit 112 of Fig 1 also acts as the capacity manager.*)

19. As per claims 6 and 23, Camble teaches wherein the partition manager further comprises a resource allocator that enables the at least one temporary resource ([0014] lines 13-20.).

20. As per claim 12, Camble teaches the step of enabling the at least one temporary resource ([0014] lines 13-20.).

21. Claims 5, 7, 8, 10, 11, 13, 22, and 24 are rejected under 35 U.S.C. 103(a) as being unpatentable over McCarthy et al., Pub. No. 2004/0194089 (hereafter McCarthy) in view of Camble et al., Publication No. US2003/0135580 (hereafter Camble), further in view of Circenis et al., Patent Number US 7,146,492B2 (hereafter Circenis).

22. Circenis et al was cited in the last office action.

23. As per claims 5 and 22, McCarthy in view of Camble does not teach an enablement code mechanism that evaluates an enablement code to determine whether the code is valid, wherein the enablement code includes the specified resource time.

However, Cercenis teaches a step of evaluating an enablement code to determine whether the code is valid, wherein the enablement code includes the specified resource-time for the purpose of making the user requested resource temporary so that they may be recovered later (*column 12, line 1 to 10*).

It would have been obvious to one having ordinary skill in the art at the time of the applicant's invention to have modified the invention of McCarthy in view of Camble with a step of evaluating an enablement code to determine whether the code is valid, wherein the enablement code includes the specified resource-time, as taught by Circenis, because it makes the user requested resource temporary so that they may be recovered later.

24. As per claims 7, 13, and 24, Circenis teaches assuring the at least one temporary resource may be recovered when a specified resource-time expires. (*column 6, lines 40 to 45; column 7, lines 5 to 15; Circenis discloses a system that constantly keep track of temporary capacity balance so that in the event of its expiration, they may be deactivated, thus guaranteeing a full recovery. It is inherent that the specified resource time is being tracked since the system is capable of tracking the amount of time the user has for using the temporary capacity, column 6, lines 53 to 60.*)

25. As per claims 8 and 10, they are the equivalent of claim 4 in addition to the extra limitation, which is taught by Circenis, of requesting an enablement code corresponding

to the at least one temporary resource for the specified resource-time and receiving the enablement code (*column 12, lines 1-10*).

26. As per claim 11, Circenis teaches the step of evaluating an enablement code to determine whether the code is valid, wherein the enablement code includes the specified resource-time (Column 5, lines 34-60; Column 6, lines 14-25).

### ***Response to Arguments***

27. Applicant's argument filed on 6/15/2007 regarding to claims 1, 2, 4-7, 8, 10-13, 14, 17, 19, and 22-24 have been fully considered, but they are moot in view of the new ground of rejection.

### ***Conclusion***

28. Applicants' amendments necessitated the new grounds of rejection presented in this office action. Accordingly, **THIS ACTION IS MADE FINAL**. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the

shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to MengYao Zhe whose telephone number is 571-272-6946. The examiner can normally be reached on Monday Through Friday, 10:00 - 8:00 EST. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Meng-Ai An can be reached at 571-272-3756. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.



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